In the Supreme Court
OF THE
United States

OCTOBER TERM, 1939

No.

J. E. RILEY INVESTMENT COMPANY (a corporation), HARRY P. SHEPPARD and HARRY DONNELLEY,
Petitioners,

vs.

WALTER SAKOW,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

We apprehend that it will be needless to repeat the statement of the case made in the foregoing petition. In this brief we will recapitulate the points made and urge consideration of the same.

PETITIONERS' CONTENTION AS TO RESPONDENT'S LOCATION CERTIFICATE.

Petitioners contend:

First. That Sakow's certificate of location is void on its face and cannot be aided by evidence *aliunde*. That it was the duty of the Court to declare it void as a matter of law.

Second. That the reference in the certificate to the initial "stake" and "posts" of the Good Hope, by name and number, without further description, is not a reference to a *permanent monument as will identify the claim, within the plain meaning of Sec. 2324,* Revised Statutes. That it was the duty of the Court to so declare as a matter of law.

Third. That even if the certificate of location had described the initial stake and post No. 2, as described in the opinion of the Circuit Court of Appeals, namely, as, each being about six by eight inches from top to bottom and blazed on four sides; four or five feet in height above the surface; firmly embedded in the ground; and, plainly visible from the valley of the creek; that this additional description would not convert the initial stake and post No. 2 into permanent monuments *as would identify the claim,* nor aid in directing anyone interested in finding the situs of the claim on the ground.

Fourth. That appellee's own testimony[1] conclusively shows that the stakes were not perma-

1. Testimony of Walter Sakow (R. 203, 204):

"Q. Will you tell this jury, Mr. Sakow, what would prevent you, or anybody else, from just picking one of these stakes and moving it anywhere you wanted to on that property? You could move this stake that was on this property to any part of the right limit of Otter creek that you wanted to?

A. That stake anybody could move as they want to.

Q. You could move this stake without any trouble?

A. Yes.

Q. You didn't tell, in your location notice, where this property was located with reference to any other claim down there, did you?

A. No, everybody in town know where my claim was located.

Q. You didn't say anything in your notice about where it was, did you?

A. No.

Q. How did you expect anybody to find your claim?

A. I don't know why anybody would want to find my claim."

nent monuments, because, as testified by him, they could be moved by anyone, without trouble, to any place on the right limit of Otter Creek. (R. 203, 204.)

Fifth. That for the Court to allow the jury to determine, in the light of the testimony and facts of this case, that stakes or posts which are not tied to any natural object, permanent monument or well known mining claim—and which can be moved without trouble by any one, to any place on the right limit of Otter Creek, are *permanent monuments as will identify the claim,* so that it can be "definitely located" and "readily ascertained", is an *abdication* by the Court of its duty. That to do so is to enthrone fiction for truth and allows a jury to declare *as a fact* that which the Court from "the testimony of their own senses" and the very nature of the thing itself proclaims is not a fact. It allows a jury to determine property rights contrary to *self evident physical facts and contrary to the truth.*

SECOND OPINION CIRCUIT COURT OF APPEALS AS TO SUFFICIENCY OF LOCATION CERTIFICATE.

The Circuit Court of Appeals in passing on the sufficiency of plaintiff's certificate of location, in its second opinion said:

> "There was a motion for a directed verdict in favor of all the defendants, bottomed on the asserted invalidity of the certificate of location of the Good Hope. The denial of this motion is

assigned as error. The argument in this respect is that the certificate failed to describe the claim with reference to some natural object or permanent monument, as required by the territorial statute. Ch. 10, Session Laws Alaska 1915.

The case was heretofore before this court on an appeal from an earlier judgment, 9 F.(2d) 8. The certificate is set out verbatim in our opinion on that appeal. The claim is described as being situate on the right limit of Otter Creek, a tributary of the Iditarod River, Otter Recording Precinct. This as the evidence shows is a featureless locality. There was testimony that the initial stake of the Good Hope measured about six by eight inches from top to bottom and had been blazed on four sides. It was four or five feet in height above the surface and was firmly embedded in the ground, so firmly that it had remained in place from the inception of the location to the time of trial in 1938. The same is true of post No. 2. Both posts were plainly visible from the valley of the creek and each bore appropriate markings.

The jury were instructed that a post or stake may be a permanent monument sufficient to satisfy the legal requirement as to identification, provided it is of a substance fairly permanent, is firmly planted in the ground, and can be readily seen and identified by a person honestly seeking to find the claim. The court left for the determination of the jury the question whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument. This was proper, and the instructions given on the subject were correct. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Bismark

Mountain Mining Co. v. North Sunbeam Co., 14 Idaho 516, 95 P. 14; Credo Mining Co. v. Highland M. & M. Co., 95 Fed. 911; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 666."

These authorities, cited by the Court, in support of its holding, that the trial "*court properly left for the determination of the jury, the question whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument.*", does not support this doctrine. These cases are hereinafter considered by us on pages 46-50.

DEFENDANTS' OBJECTIONS TO LOCATION CERTIFICATE.

The validity of plaintiff's certificate of location was challenged by defendants, in the trial Court:

First. By objecting to its introduction in evidence, upon the grounds:

(1) That this notice fails to identify the claim with reference to some natural object, permanent monument, or well-known mining claim, so that it can be readily identified.

(2) That no person, from an inspection of this certificate of location, could determine with reasonable certainty the location of the claim.

(3) That the only description in this notice is that the claim is situate on the right limit of Otter Creek, and that that is not a natural object or permanent monument of itself sufficient to identify the claim.

(4) That the statutes of Alaska, in addition to the requirement that the certificate of location shall identify the claim with reference to some natural object, permanent monument, or well known mining claim, also requires a description of the post, or stakes, upon the ground, by reference to their numbers; and, that the numbering of the stakes, or posts, does not constitute a natural object or permanent monument. (R. 51, 52.)

Second. By moving for a directed verdict in favor of all of the defendants upon the ground, that, the certificate of location failed to describe the property with reference to some natural object or permanent monument or well known mining claim, as required by law; and, that when a record of a location of a mining claim is required by local law, that then the record is an essential part of the location, and is mandatory; and, that the failure to meet the requirements of the law in this respect is tantamount to a failure to record. (R. 225, 226.)

The objections to the introduction of the certificate in evidence presented a legal question that must be determined from an inspection of the certificate itself, unaided by oral testimony or extrinsic fact.

It is the universal rule that "the construction of all written instruments belongs to the court".

4 *Wigmore on Evidence,* Sec. 2556.

The Circuit Court of Appeals recognized this rule, when on the first appeal, it declared as a matter of

law, that the reference in the certificate to the right limit of Otter Creek "does not identify it"; and, also, when it declared that there was an *"absence of a description of one of the stakes as a permanent monument"*. The Court having declared that the *natural object mentioned in the certificate, namely, Otter Creek, did not identify the claim;* and, that there was an *absence of a description of a permanent monument* should have declared, then and there, the certificate void.

It is well established that where the insufficiency of the location certificate in its failure to make an intelligent reference to natural objects or permanent monuments, *is apparent on its face, that it is void and must be rejected.*

In *Dillon v. Bayliss* (Mont.), 27 Pac. 725, 726, the Court says:

> "Now, what are the facts as to the location notice in question? We examine it now upon its face alone, to ascertain whether it should, prima facie, be admitted in evidence, wholly disregarding, for the present, all uncertainties and ambiguities that may be developed by evidence aliunde the notice."

In *Darger v. LeSieur* (Utah), 30 Pac. 363, 364, the Court says:

> "We think the court erred in admitting in evidence plaintiffs' location notices. They are fatally defective, and valid locations cannot be made under them."

In *Flavin v. Mattingly* (Mont.), 19 Pac. 384, the Court on page 385 says:

> "The objection evidently went to the effect, instead of the admissibility, of the evidence. If there was no description contained in the notice, or attempt to describe the locality or vicinity of the mining claim by reference to some natural object or permanent monument, it might have been excluded by the court. But, where the description contained in the notice is merely defective, it should be left to the jury with other evidence in the case."

See, also:

Brown v. Levan (Idaho), 46 Pac. 661, 663;
Faxon v. Banard, 4 Fed. 702;
Drummond v. Long (Colo.), 13 Pac. 543;
Clearwater etc. v. San Garde (Idaho), 61 Pac. 137, 138;
Brady v. Husby (Nev.), 33 Pac. 801, 803;
Gilpin Co. v. Drake (Colo.), 9 Pac. 787;
Baxter etc. v. Patterson (N. M.), 3 Pac. 741, 742;
Purdum v. Laddin (Mont.), 59 Pac. 153 (cited with approval in *Vedin v. McConnell*, supra);
Londonderry v. United Gold M. Co. (Colo.), 88 Pac. 455, 457;
Cloninger v. Finlaison, 230 Fed. 98;
Vedin v. McConnell, 22 F. (2d) 753.

POSTS OR STAKES AS PERMANENT MONUMENTS.

Defendants contended at the trial that the principal characteristic of "permanent monuments" are their *"stability and permanency"*. That they must be fixed and durable—not "unstable and ephemeral". That they must be suitable as "land-marks". That one of the ends designed to be corrected by Sec. 2324, was to the "floating or shifting" of claims. In order that this purpose should be called to the attention of the jury, defendants requested the Court to instruct them, as follows:

> "I instruct you that the posts or stakes claimed by plaintiff to have been established by him at the time of his location on October 27, 1930, are not permanent monuments within the meaning of the law, for the reason that said posts or stakes were not tied to any object and could be shifted to any place on the right limit of Otter Creek to suit the convenience of the plaintiff or to cover any subsequent pay streak that might be uncovered." (R. 227, 228.)

It must be borne in mind that:

> "The words 'natural objects' and 'permanent monuments' are general terms, susceptible of different shades of meaning, depending largely upon their application. What might be regarded as a permanent monument for one purpose might not be so considered with reference to a different purpose. * * * There is no particular necessity for drawing a distinction between 'natural objects' * * * and 'permanent monuments' which may imply an element of artificial construction, it *being the manifest intent* of the law that any *object of*

a fairly permanent character, whether natural or artificial, *may, if sufficiently prominent,* serve for the purpose of reference and identification."

2 *Lindley on Mines* (3rd Ed.), Sec. 383.

It is evident, therefore, that posts or stakes of sufficient size and firmly planted in the ground, with proper markings, may be deemed permanent monuments for the purpose of marking the boundaries of the claim upon the ground so that they can be readily traced as required by Sec. 2324; and, that the same stakes or posts, *unless they are tied definitely to some natural object or permanent monument,* would not meet the requirements of the section as to identifying the claim.

Even if we concede, *arguendo,* that the stake and posts mentioned in Sakow's certificate are permanent monuments, they do not "give the claim definite location", and meet the requirements of Sec. 2324, Revised Statutes, which provides that the monument or natural object must be such 'as will identify the claim' ". As was said in *Quimby v. Boyd* (Colo.), 6 Pac. 462, 467:

"What might be regarded as a permanent monument for one purpose, might not be so considered with reference to a different purpose. So of natural objects. They abound everywhere, but their characteristics vary greatly, some being *unstable and ephemeral,* others *fixed and durable;* and since only those possessing the *latter qualities are suitable for landmarks,* it is evident that such only were intended by the terms employed in the section referred to."

FEDERAL DECISIONS CONSTRUING SEC. 2324, R. S.

For the convenience of the Court, we have quoted from the leading decisions of the Federal Courts, construing Sec. 2324, Revised Statutes. These cases will be found on pages 50-56, post. We have also set out, in some of the cases, the location certificates involved.

STATE DECISIONS CONSTRUING SEC. 2324, R. S., AND STATUTES SIMILAR TO THE ALASKA STATUTES.

We have likewise, post pp. 57-61, quoted from state cases, construing Sec. 2324, R. S., and statutes similar to the Alaska Statutes. In some of the cases we have also set out the location certificates involved.

FLOATING OF CLAIMS.

In order, that the jury might have a comprehensive understanding of the purpose of the certificate of location, and, as a challenge to the sufficiency of plaintiff's certificate, defendants requested the Court to instruct the jury, as follows:

> You are instructed that the purpose of the law, in requiring a certificate of location to describe the claim with reference to some natural object, permanent monument or well-known mining claim, is three-fold.
>
> First. To secure a definite description—one so plain that the claim can be readily ascertained. Second. To prevent the floating of the claim almost anywhere to suit the wishes of the locator

or to cover a pay streak that may be subsequently discovered.

Third. To enable a person looking for mineral deposits to find the natural object or permanent monument or well known mining claim described in the notice and, from the descriptions of the stakes or posts contained in the notice, trace the boundaries of the claim. (R. 225, 226.)

This instruction the Court refused to give.

The plaintiff had testified that the stakes established by him at the time of his location on October 27, 1930, could be moved by anyone without trouble to any place on the right limit of Otter Creek. (R. 204.) But without plaintiff's testimony this is a self evident fact.

For the purpose of showing how the Courts of the western mining states treat certificates of location that permit the claim to be "floated and swung" most anywhere to suit the wishes of the locator, we quote, from the following cases:

In *Brown v. Levan* (Idaho), 46 Pac. pages 661, 664, the Court says:

> *"The discovery stake might have been moved many times, and no one unacquainted with the location could have discovered from the location notice that it had been so moved.* We think it the duty of the court to give mining notices and records a liberal construction, to the end of upholding a location made in good faith. But where the description and reference to a natural object or permanent monument is of such a character that a mining engineer could not find the

claim from the location notice, as is evident in this case, and where it is such that the claim may be floated almost anywhere to suit the ground or to cover ore that may have since been discovered, *it is clearly such a notice as cannot furnish a foundation for a valid location.*"

In *Darger v. LeSieur* (Utah), 30 Pac. 363, the Court said in speaking of a location certificate on page 365:

"* * * it will readily be seen how they could be swung around so as to cover any piece of ground sought to be taken by anyone else within a radius of several miles. We think the descriptions in the locations are not such as is required by the statute. Drummond v. Long, 13 Pac. 543; Faxon v. Banard, 4 Fed. 702; Mining Co. v. Drake (Colo.), 9 Pac. 787."

In *Drummond v. Long* (Colo.), 13 Pac. 543, the Court says at the bottom of page 544:

"Mining litigation under the Act of Congress discloses frequent attempts to secure a patent for mining territory other than the territory originally located, in fraud of the government and in fraud of the rights of neighboring locators. The foregoing are some of the considerations upon the statutory requirement we are considering are based.

The intention of the provision is to give one seeking the locus of a recorded claim something in the nature of an initial point from which to start, and following the course or distance given, find with reasonable certainty the claim located. The identification must be by reference to some natural object or permanent monument."

In *Mutchmor v. McCarty* (Cal.), 87 Pac. 85, the Supreme Court of California said (syllabus):

> "Where a notice of location of a lode claim failed to contain a description of the claim by reference to a natural object or permanent monument by which it could be identified, as required by Rev. St. U. S. Sec. 2324, it was ineffective for any purpose."

NATURAL OBJECTS AND PERMANENT MONUMENTS OF OTTER CREEK.

The Circuit Court of Appeals, in its opinion, says that the evidence shows that the right limit of Otter Creek "is a featureless locality". This statement can only refer to that portion of Otter Creek, that lies between Flat Creek, on the west, to Discovery Claim on Otter Creek, on the east, as, this is the only part of Otter Creek referred to in the record. Flat Creek flows into Otter Creek at the town of Flat and is about a mile and a half (at its conjunction with Otter Creek) from the Good Hope claim. (R. 21, 90.) This is a natural object to which Sakow could have tied the Good Hope claim. The distance from Flat to Discovery Claim, Otter Creek (where there is also a small town) (R. 98) is about two and one-half miles. (R. 90.) Sakow could have tied the Good Hope to Discovery claim which is the customary mode of tying mining claims in Alaska. (*Smith v. Casaden,* 148 Fed. 794.) The Good Hope claim is situated between Flat and Discovery—about a mile west of Discovery. Between the town and Flat and the Good Hope claim is the Government Bridge. Cotten, appellee's surveyor,

tied his survey of the Good Hope claim to the bridge. (R. 22.) This bridge according to Sakow's plat (R. 81), is a little less than a half mile in a westerly direction from the Good Hope. Sakow could have tied his claim to the bridge, in his certificate of location. The record also shows that a Government Road (running east and west toward the town of Flat), was about 600 feet north of the North Star Association (R. 99) and Sakow could have tied his claim to this road. Furthermore the record, undisputed, shows, that in 1914, a survey was made of the K. P. M. Association and that at that time the north line of the K. P. M. Association was cut and brushed out its full length, to a width of from seven to ten feet. That this north line was used as a winter and summer trail between the town of Flat and Discovery, Otter Creek. (Appellants' Opening Brief, p. 58.) The record also shows that there were other well known claims, in close proximity, namely the Last Chance, Reindeer, and Creek Claim No. 3, below Discovery on Otter Creek. (R. 90, 98.) Sakow could have tied his claim to any of these and also to the trail along the north line of the K. P. M. Association. Appellee's plat also shows that the Government bridge is tied to Pyramid Peak. (R. 81.)

AUTHORITIES CITED BY COURT DO NOT SUPPORT HOLDING.

The authorities, cited by the Circuit Court of Appeals, in support of its holding, that the trial Court properly left for the determination of the jury, the question whether any of the stakes mentioned in the

location certificate of the Good Hope constituted a permanent monument, do not support such a doctrine.

The cases cited are *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291; *Bismark Mountain Mining Co. v. North Sunbeam Co.*, 14 Idaho 516, 95 P. 14; *Credo Mining Co. v. Highland M. & M. Co.*, 95 Fed. 911; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 11 Fed. 666. We will proceed to consider these cases in their order.

Hammer v. Garfield.

In the case of *Hammer v. Garfield*, the claim was identified as being "located about fifteen hundred feet south of Vaughan's Little Jennie Mine" and described as being situated in the Vaughan mining district, Lewis and Clarke County, Montana, and described by metes and bounds with reference to stakes.

The Court in speaking of the notice said:

> "Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are in such cases the most certain means of identification. Such stakes were placed here with a description of the premises by metes; *and to comply with the requirements of the statute, as far as possible,* the location of the lode is also indicated by stating its distance south of 'Vaughan's Little Jennie Mine', *probably the best known and most easily defined object in the vicinity.* We agree with the court below that the Little Jennie Mine will be presumed to be a well known natural object or permanent monument until the contrary appears, where a location is described as in this

notice and is further described 'as being 1500 feet south from a well known quartz location, and there is nothing in the evidence to contradict such a description, distance, and direction'."

Here we find a definite direction to the locus of the claim.

It is clear that the Court did not hold that a reference to stakes or posts, alone, in the certificate, constituted a reference to a permanent monument as would identify the claim. On the contrary, it laid down the rule, that, in the absence of evidence to the contrary, a reference, in the notice to a mining claim, will be presumed to be a well known natural object or permanent monument until the contrary appears. The Court then says, in substance, that stakes driven into the ground to mark the boundaries of the claim and which are described as being 1500 feet south of a well known quartz claim is a sufficient *description* in the absence of evidence to contradict it.

Credo M. & S. Co. v. Highland, supra.

In this case there was a conflict between two quartz mining locations. One of the claims was known as: "The Comstock Claim", situated in the Chewelah Mining District, Stevens County, State of Washington. The notice of location is set forth in the opinion. It describes the claim with reference to posts by metes and bounds and designates the stakes by reference to the points of the compass. After so doing, it then says:

"This claim is further described as follows: About one mile southwesterly from the Marshall

Lake and two and one-half miles northerly from Pend d O'Rielle river. Posts are placed at the corner and both ends of center lines. This notice is placed at discovery."

Judge Hanford in passing upon this notice said:

"It is quite plain from the reading of the notice itself that the locators of the Comstock claim intended to meet fully every requirement of the law. The notice which they caused to be recorded described the claim by reference to posts at each of the four corners, and at the centers of both end lines, and, for the purposes of indicating the approximate situation of the claim, the notice also refers *to a lake and a river, giving approximately the distances and directions therefrom to the claim.* There is testimony disputing the accuracy of the distances and directions mentioned, and I have no doubt that, *if there were no other description of the claim in the recorded notice than the reference therein to the lake and river, it would be impossible to identify the claim by such a reference; but, on the other hand, the evidence convinces me that an intelligent person, having no other guide than the description of the claim contained in the recorded notice, would be aided by the reference to the lake and river in finding the vicinity of the claim, and when there would be able to readily find the claim and identify it by the posts referred to in the notice. By this test the recorded notice appears to me to be sufficient.*"

The Court further says:

"I find from the evidence that the post by which the lines of the claim were marked are

> from five to seven inches in diameter, and were all firmly planted in the ground, and stood not less than five feet above the ground, and I hold that they are permanent monuments, within the definition of the phrase 'permanent monuments' in this statute."

This authority strongly supports our position that the description of the claim in the certificate must be the sole test of its sufficiency. That where, as in this case, there are references to natural objects, and a description of the claim by metes and bounds according to the stakes on the ground, that then the question whether such description in reality ties the claim to a natural object or permanent monument is one of fact. But, where the certificate neither describes the claim with reference to a natural object or permanent monument, that, then no question of fact can arise.

Bismark Mountain Co. v. North Sun Beam Co.

In *Bismark Mountain Co. v. North Sunbeam Co.*, 95 Pac. 14, the certificates after describing the claim as 1500 feet in length by 660 feet in width and giving a description by metes and bounds according to the corner stakes which are designated according to the compass, then says, that the claims are situated on "Bismark Mountain". The evidence at the trial disclosed that *"Bismark Mountain" is a small mountain; that it could be covered by ten or twelve mining claims" and "that it was a well known object around there in the Yankee Fork District; and that it is known among prospectors there everywhere".*

The Court in this case held, that:

> "* * * the object of requiring a reference to a natural object or permanent monument is to furnish means by which to identify the claim, and whatever reference will accomplish this object satisfies the law."

The Court held that under the facts of the case that "Bismark Mountain" was a "natural object" and that it was sufficient to identify the claim.

The Court also quoted with approval the following language from *Flavin v. Mattingly* (Mont.), 19 Pac. 384:

> "The object of the law, in requiring the location to be made in reference to some natural object or permanent monument, is not very apparent, unless it was for the main purpose of directing attention in a general way to the vicinity or locality in which the location was to be found."

Jupiter v. Bodie.

Jupiter Mining Company v. Bodie Cons., M. Co., 11 Fed. 679, simply holds that: "permanent monuments may consist of a prominent post or stake firmly planted in the ground".

FEDERAL CASES CONSTRUING SEC. 2324, REVISED STATUTES.

The Supreme Court of the United States in *Hammer v. Garfield Mining & Milling Co.,* 130 U. S. 291, 299, in speaking of the provision of Sec. 2324 of the Revised Statutes which provides that all records of mining claims

> "shall contain the name or names of the locator, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim".

said:

> "These provisions, as appear on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose."

This Court in *Smith v. Cascaden,* 148 Fed. 792, quoted with approval, on page 793, the above quoted language of the Supreme Court in *Hammer v. Garfield etc.* This Court, in the same opinion, also set forth as a test to the sufficiency of the recorded notice involved in that case, as follows:

> "The question then, is whether, in view of the customary mode of describing mining claims in the Fairbanks district in Alaska, a person with the information which this recorded notice gives could find the location of this particular claim on the ground with reasonable certainty by going to the natural and permanent objects referred to in the notice. If he could, the notice is sufficient. North Noonday Mining Co. v. Orient Mining Co. (C. C.), 1 Fed. 522."

In *Cloninger v. Finlaison,* 230 Fed. 98, the Court in passing upon the sufficiency of a certificate of location under the Alaska Act, 1913 (which for the purposes of this case may be considered the same as the 1915 Act) said:

"The plaintiff's certificate declared that the name of the claim is 'No. 1, Bear Creek placer mining claim', that it is situated in the White River mining district, territory of Alaska, and that 'Bear Creek is a tributary of Big Eldorado'."

One of the objections to the certificate was that it did not set forth a description of the claim with reference to "some natural object, permanent monument or well known mining claim", as required by Alaska laws 1913, c. 74, Sec. 10.

The Court in commenting upon this notice said:

"* * * in the case at bar the description refers to no natural object, or permanent monument, or well known mining claim. The name 'claim No. 1, Bear Creek placer mining claim' does not necessarily mean that the claim is located on Bear creek, and if the claim had been described as located on that creek, the notice would still be insufficient to comply with the statute, for a creek or a river, without other description, will not answer for the natural object required by the statute, *so as to give the claim definite location,* and meet the requirements of Section 2324, Revised Statutes (Comp. St. 1913, Sec. 4620), which provides that the monument or natural object must be such 'as will identify the claim'.

In McKinley Mining Co. v. Alaska Mining Co., 183 U. S. 563, 46 L. Ed. 331, the claims were described as located on McKinley creek, and at a stated distance from the first falls on the creek. The court said:

'These notices constituted a sufficient location. The creek was identified, and between it

and the stump there was a definite relation, which, combined with measurements, enabled the boundaries of the claim to be readily traced.'

But in the present case the claim has no definite relation to the creek, and the mere mention of Bear creek serves in no way to identify the claim. Faxon v. Barnard (C. C.), 4 Fed. 702."

In *Vedin v. McConnell,* 22 F. (2d) 753, the certificate of location under consideration was as follows:

"Chatanika, Alaska, July 1, 1921.

I have this day relocated the twenty acres of placer ground known in original records as the Anderson claim. Bounded on the west by the McFarland fraction, on the south by the Diamond fraction and McKnutt, on east by Serpentine, on north by the Duncan and 17 creek.

The ground runs 1,320 feet up and down Latanika and across Cleary creek about three hundred on west end. Ground lies in the Fairbanks Mining and Recording Precinct.

Claim 16 below Cleary.

Oliver A. McConnell.

Witness: Morris O'Leary.

Filed for record July 16, 1921, at 15 min. past 11 a.m.

Reed W. Heilig, Recorder."

In declaring this certificate of location void the Court said:

"For the reasons which have often been explained, the courts treat with great indulgence inaccuracies and uncertainties in initial notices and markings prescribed for mining locations.

But the same considerations do not apply to the recorded certificate of location, where, as here, a liberal length of time is given in which to make such record; *and to uphold defendant's certificate, in the light of all the facts, would be to set at naught the substantial requirements of the law.* Without deciding that each of the defects would, in itself, be fatal, it is to be noted that the certificate fails to disclose the width of the claim, to give a description by reference to numbered stakes or monuments (Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153), to state the date of the discovery or posting of location notice, *or to tie the claim to any permanent monument or natural object, except by the vague and wholly inadequate reference to 'Cleary Creek' and 'Latanika'.*"

In the case of the *United States v. Sherman,* 288 Fed. 297, the United States Circuit Court of Appeals for the Eighth Circuit, in construing the legal effect to location certificates involving two mining locations known as "Oaxaca" and "Helamonster", at page 501 said:

> "There is another fact showing that appellee never made a good and valid location. R.S.U.S. Sec. 2324, has this additional requirement:
>
> 'All records of mining claims hereinafter made shall contain the name or names of the locator, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.'
>
> In furtherance of this the South Dakota statutes (Rev. Code 1919, Secs. 8728, 8729) requires

the filing of a location certificate with the register of deeds of the county * * * and says that if the description in it is not such as shall identify the claim with reasonable certainty it shall be void. The location certificate filed by appellee for the Oaxaca lode, after stating that it is in Pactola mining district, Pennington County, described it thus:

> 'Said claim is located about one mile west of Pactola and north of Rapid creek in Boarding House Gulch and is about 1500 feet east of Sherman Placer, being a full claim in size running 500 feet northwesterly from center of discovery shaft and 1,000 feet southeasterly from discovery shaft.'

The Helamonster certificate recites that it is in the Pactola mining district, Pennington County, and describes it thus:

> 'Said claim is bounded on the north by Oaxaca lode and lies parallel with said claim, and bounded on the south by the Captain Jack placer and is north of Rapid creek in Boarding House Gulch, being a full claim in size running 600 feet northwesterly from center of discovery shaft and 900 feet southeasterly from center of discovery shaft.' "

The Court in speaking of the certificate said:

> "The descriptions given in the location certificate were not such as to identify the claim with reasonable certainty, which also rendered the location void. Erhardt v. Boaro, 113 U.S. 527, 28 L. Ed. 1113; Marshall v. Mining Co., 1 S.D. 350, 47 N.W. 290; Regan v. Whittaker, 14 S.D. 373, 85 N.W. 863."

In the case of *Faxon v. Barnard,* 4 Fed. 702, the description of the location considered by the Court read as follows:

> "Situated on the north side of Iowa gulch, about timber line, on the west side of Bald mountain. Said claim is staked and marked as the law directs."

Of this the Court said:

> "It is utterly impossible to find in this language any reference to a natural object or permanent monument defining the location, *and the only question is as to the effect of the omission.* The act of congress requires such reference to be made in the description of the claim (Rev. St. Sec. 2324), and the state legislature has declared that the certificate shall give 'such description as shall identify the claim with reasonable certainty.' Rev. St. Col. 630. *Compliance with the act of congress would fulfill all that is required by the state, and it may be said that the acts are in perfect harmony.* But, if that were otherwise, there is no doubt as to authority of congress nor as to the purpose of the law in requiring that the claim shall be definitely described."

STATE DECISIONS CONSTRUING SEC. 2324, R. S., AND STATUTES SIMILAR TO THE ALASKA STATUTE.

In *Darger et al. v. LeSieur* (Utah), 30 Pac. 363, 364-365, one of the location notices, which were alike, read as follows:

> "Notice of Location. This is to certify that we, the undersigned, have this day located and claim 1,500 feet in length on this ledge of shale and wax and three hundred feet on each side of the center of location. We claim three hundred feet running east and 1,200 feet running west from monument. We claim all the privileges granted to miners by the laws of the United States and the territory of Utah. This ledge is situated up near the head of the right hand fork of what is known as 'Tie Canyon' and about five miles from the Denver & Rio Grande Railroad, in Utah county, Utah territory, and shall be known as the 'Belcher Lode'."

The Court in commenting upon this notice said (p. 364):

> "We think that the court erred in admitting in evidence plaintiffs' location notices. *They are fatally defective and valid locations cannot be made under them.* Section 2324, Rev. St. U.S., requires that there must be such a description of the claim located, by reference to some 'natural object or permanent monument' as will identify it. Assuming, although it was not proven at the trial, that the Denver & Rio Grande Railway had a track in Utah County, *an officer armed with a writ of restitution* under the verdict and judgment could not, from the description given, put

plaintiffs in possession of their claims. They are described as being about five miles from the railroad tract, but in what direction or from what point on the railroad, is not stated. 'About five miles' from a railroad is very indefinite as to distance. It might possibly be but four or four and a half miles, or it might be five and one-half or even six miles. They are described as being 'up near the head of the right hand fork of Tie Canyon'. The head of the fork of a canyon is a very indefinite and uncertain locality, but these claims are described as not at, but only near, the head of the canyon, but in what direction, or how far away, is left to conjecture. * * *

But, however they may be located as to each other, *it will readily be seen how they could be swung around so as to cover any piece of ground sought to be taken by any one else within a radius of several miles.* We think the descriptions in the locations are not such as is required by the statute." (Citing cases.)

In *Clear Water Short-line Ry. Co. v. San Garde et al.* (Idaho), 61 Pac. 137, the notice described the claim as follows:

"The discovery stake or monument is 600 feet from the mouth of what is known as 'Big Canyon'. Commencing at discovery, running 750 feet southeast to S.E. end center, thence 300 feet south to south cor., thence 1,500 feet to N. west cor., thence 300 feet N.E. to northwest end center, thence 300 feet north to north cor., thence 1,500 feet to east cor., thence 300 feet to south end center, and back to place of beginning."

The Court in considering the objections to this notice said:

> "It is objected by appellant that the location notice of defendants is fatally defective, in that it does not give the direction for the distance of 600 feet from the discovery monument to the mouth of Big Canon creek, the natural object to which it was attempted to tie the claim. * * *
>
> The mouth of Big Canon is the 'natural object or permanent monument' to which it is sought or attempted to tie the location; but no direction is given in the notice, no point or place in the mouth of the Big Canon is designated, and consequently the latitude of the area which might be covered by the locator in surveying or changing his location from the point of discovery is entirely indefinite * * * It does not appear from the record what the width of the canon is. A location 600 feet from the mouth of the canon, without any indication as to the direction from the point of discovery, *would include a swinging privilege which it is the purpose of the statute to void and prevent.* * * * *The location in this case was void.*"

In *Gilpin Co. Min. Co. v. Drake* (Colo.), 9 Pac. 787, 789, the description in question was as follows:

> "Beginning at the westerly end of the Gilpin County Mining Company's property, on the Williams lode, in Lake Gulch mining district; runs thence in a westerly direction a distance fifty feet, to the easterly end of Packard and Updegraph's property, on said lode."

Concerning this notice, the Court said:

"It is conceded that the claims referred to are patented claims, and that they supply the permanent monuments required by the act of congress. Still the reference thereto in the location certificate, and the description of the claim located, are too indefinite to enable the same to be fully identified or its boundaries readily traced from this certificate alone. 'Beginning at the westerly end' of a certain mining claim. At what point on this westerly end? Was it at a corner or in the center or at some other point on the line of its westerly end? The certificate does not tell. 'Runs thence in a westerly direction a distance of fifty feet, to the easterly end of Packard and Updegrath's property, on said lode'. What part of the easterly end of this property did this line intersect? *What kind of monuments, if any, were at the point of commencement* and at the point of closing this easterly and westerly line? Through what part of the Weitbrec location did this line pass? Was it through the center, or along one side line? Where was the discovery situated with reference to this line? To what fixed point in said shaft, or any other part of said claim, tied? It is apparent that no information is furnished by this certificate which would enable any one to trace the boundaries of this claim. *The discovery shaft is tied to nothing definitely, nor is any corner or point of the claim, so far as appears from this record.*

The statute pronounces such a *location certificate void;* there was therefore no error in rejecting it."

In *Mutchmor v. McCarty* (Cal.), 87 Pac. 85, the location notice of the location claim taken from the transcript on appeal is, as follows:

> "Notice is hereby given, that I, James Kennedy, a citizen of the United States, claim fifteen hundred (1500) feet of this quartz vein bearing gold and six hundred (600) feet in width and bound on each corner with stakes and monuments and named the Emerald and I intend to hold and work said claim according to mining laws of the United States situated in Madam Feliz mining district, Calaveras County, State of California.
>
> Dated on the ground this 18 day of June, 1890. The general direction of this claim is northwesterly and southeasterly. Locator James S. Kennedy."

Of the above notice, Chief Justice Beatty, says:

> "This notice is invalid under the act of congress Sec. 2324 R. S. for the reason that it contained no description of the claim by reference to any natural object or permanent monument by which it might be identified."

In the recent case of *Dennis v. Barnett,* 85 P. (2d) 916, 918, the District Court of Appeal of California, in speaking of the requirements of Sec. 2324, Revised Statutes, said:

> "The *essential requirement* is that it shall be so *described and identified that it* **could be found or located from the description by any one interested in so doing, in other words, that the location of the claim can be readily ascertained."**

It is respectfully submitted that the Writ of Certiorari prayed for should be issued so that the judgment of the United States Circuit Court of Appeals, Ninth Circuit, may be reversed by this Honorable Court.

Dated, San Francisco, California,
June 3, 1940.

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(Appendix Follows.)